



POLICE DEPARTMENT

May 11, 2009

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Mike Civil
Tax Registry No. 935092
76 Precinct
Disciplinary Case No. 83490/07

Police Officer Jerry Ortiz
Tax Registry No. 937227
70 Precinct
Disciplinary Case No. 83489/07

The above-named members of the Department appeared before me on December 12, 2008, charged with the following:

Disciplinary Case No. 83490/07

1. Said Police Officer, Mike Civil, assigned to the 70 Precinct, while on-duty, at or about 1540 hours on July 8, 2006, in the vicinity of 2328 Bedford Avenue, Kings County, used excessive force against an individual known to this Department, to wit: throwing him against a wall and holding him there by his shirt.

P.G. 203-11 – Page 1, – Paragraph 2 – FORCE

Disciplinary Case No. 83489/07

1. Said Police Officer, Jerry Ortiz, assigned to the 70 Precinct, while on-duty, at or about 1540 hours on July 8, 2006, in the vicinity of 2328 Bedford Avenue, Kings County, used excessive force against an individual known to this Department, to wit: repeatedly striking him in the face with a closed fist.

P.G. 203-11 – Page 1, – Paragraph 2 – FORCE

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The Department was represented by Yadhira Gonzalez-Taylor, Esq., Department Advocate's Office, and the Respondents were represented by Craig Hayes, Esq.

The Respondents, through their counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Disciplinary Case No. 83490/07

Respondent Civil is found Not Guilty.

Disciplinary Case No. 83489/07

Respondent Ortiz is found Not Guilty.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

Certified Medical Records for Habakkuk Tracey

Department Exhibit (DX) 1 is the certified medical record for Tracey. He received emergency room treatment at the Kings County Hospital Center on July 8, 2006. His residence was listed at an address [REDACTED] He was treated for a superficial laceration to the rear of the left ear. Chief complaint notes "left ear." The Chart Review Print page on Enclosure 30 C notes that Tracey was accompanied by the "NYPD." The record further notes that there was no active bleeding and that Tracey was to return to the emergency room if he suffered any swelling. In Enclosure 31A, the visual assessment note is "unremarkable." In the questionnaire, it asks if there is any evidence

of acute medical or mental problems and the answer given is "No." The Civilian Complaint Review Board (CCRB) Complaint Report attached to the medical records notes that Tracey received one suture to the laceration behind his left ear and he sustained one "lump" on the head.

The Department called Habakkuk Tracey and Meesha DeLeon as witnesses.

Habakkuk Tracey

Tracey is a 33-year old resident of [REDACTED] who works as a superintendent/porter. On July 8, 2006 inside [REDACTED] at approximately 3:40 p.m., Tracey testified that he was present at that location because [REDACTED] Tracey stated that something unusual happened to him on that date. He was assaulted him by Respondent Ortiz and Respondent Civil on the second floor in that building.¹

Tracey testified that on the day in question, he had just come back from trying to buy his son a pair of sneakers. His plan for the day was to take his son to the movies to see "Superman." He walked down Flatbush Avenue about seven or eight blocks, stopped at the barbershop at Tilden and Bedford Avenues, [REDACTED] He told a barber that he would be back [REDACTED] to get a haircut. As he walked into the building, he saw about four police officers, who then approached him. He heard one of the officers ask if that was him [referring to Tracey].

Tracey explained that he recognized one of the officers. He did not know him by name, but he described him as approximately 5 feet, 9 inches tall, dark-skinned with a short haircut. He further explained that he once lived on [REDACTED], and when that officer

¹ Tracey identified both Respondent Civil and Respondent Ortiz in the courtroom.

was a rookie, he patrolled the area where he lived. Tracey said they had basic conversations in the past, nothing unlawful. Tracey recalled that they spoke about the Israelites who stood on Parkside and Ocean Avenues. He recalled that officer telling them to move and that they could not stand there. Tracey said he questioned the officer about why the Israelites could not stand there. He said he had seen Jewish people standing there a few weeks earlier. Tracey stated that he never had negative interactions with that officer.

Tracey stated that after the officers approached him in the lobby, they all began to search him and then the officer he knew told them that he was all right. As the officers resumed what they were doing, he continued up the stairs. The officer whom he knew asked him how he was doing. He replied that he was startled for a moment. Respondent Civil then retorted, "Shut the fuck up. Keep it moving." Tracey stated that he gave the officer he knew a look as if to say, "see what I'm talking about," and then Respondent Ortiz replied, "Shut the fuck up and keep it moving." Tracey said as he continued up the stairs, he looked back at the officer he knew and said, "You see what I'm talking about? You don't have to talk like that. Smarten up." Just as he made that statement, Respondent Civil came dashing up the stairs. He tried to pick up his pace to get to the third floor. As he approached the stairs, Respondent Civil grabbed him, threw him against the wall and told him that he should "shut the fuck up and kept it moving." He also told him that all he had to do was keep his mouth closed. Respondent Ortiz then came up the stairs and punched Tracey four or five times on the left side of his head.

Tracey testified that Respondent Civil told him to turn around, get against the wall and that he was going to jail. Tracey explained that behind his left ear was "busted

open.” As he was escorted downstairs to the first floor and out of the building, he spoke with Respondent Civil and told him that if he was not an officer, he could not treat him like this. Respondent Civil responded by telling him that he lived on Ocean and Midwood Avenues, and he should come and see him because he does this on his “off time.”

Tracey said he went in the prisoner van and was taken to the station house. While banging on the cell, he was seen by the Emergency Medical Service (EMS) . He said he asked Respondent Civil to take him to the hospital, but was told that they would be there all night. Tracey explained that he had blood on his arm, T-shirt and tank top. He said that Respondent Ortiz appeared fearful as he stated, “Oh, my God, oh, my God, oh, my God. My partner is crazy...” Tracey said he told Respondent Ortiz to let him go and he would not say anything. Respondent Ortiz said he could not let him go in that condition. He told Tracey that he would try to work something out if he did not go to the hospital. Tracey stated that he refused to go to the hospital.

Sometime later, Tracey said that Respondent Ortiz came back to the cell with a piece of paper which stated that while being arrested Tracey was injured. Tracey explained that since the paper did not state how he sustained his injury, he signed the paper and was hoping to be released. Instead, he was restrained and transported to Central Booking. While there, Tracey stated that he bent down to tie his shoe and that “...the blood that was a dried up behind my ear must have cracked open. Blood started trickling out of my ear again.” And Tracey stated that the officer at Central Booking asked him who brought him to the facility. He explained that he came from the 70 Precinct. The officer informed him that someone needed to take him to treatment

because he could not be in Central Booking in that condition. Ultimately, he said he was taken to the hospital and received five stitches. Tracey displayed the area of the injury in open court. It appeared to be a slightly darker pigmentation behind his left ear with no scarring.

Tracey denied arguing with Respondent Ortiz and Respondent Civil about what they were doing. He denied criticizing them about the police activity that they were conducting. He denied placing his body in between the two Respondents and the apartment that they were attempting to go into. He denied ever telling them that he would not move out of their presence and Tracey stated that he did not observe anyone else getting arrested or interfere with any potential arrest inside or outside of the building. Tracey also denied biting, kicking, punching or displaying a weapon toward either of the Respondents.

Tracey testified that he was in a drug program sponsored by the Fortune Society. He stated that he had an agreement with the District Attorney's office that if he had "clean urine" for six months his case would be dismissed. While attending the drug program, Tracey stated that he was also attending school. He denied that he had ever been assaulted by the police prior to this incident. He also stated that he never filed a complaint against police officers because of brutality or police misconduct. When asked why he was angry about the incident with the police, Tracey stated, "I was assaulted for no reason...I can see the grabbing and the throwing me against the wall and the searching me, but the assault part was like, it was real dim to me. I couldn't understand that."

During cross-examination, Tracey acknowledged that he had been arrested for obstructing governmental administration, menacing and resisting arrest in this matter.

Tracey acknowledged that some of those charges are still pending and that he has a case in Kings County Criminal Court in January. He admitted that this matter was not his first arrest. He denied being arrested in 1998 for possession of a weapon. Tracey was shown a document to refresh his recollection. He acknowledged that the document noted Penal Law section 265.01 [criminal possession of a weapon]. He also acknowledged that the document contained his name. Tracey explained that an individual was assaulted and stabbed and that the individual stated that he [Tracey] was present. Tracey denied taking part in that incident. He was again asked if he was arrested for possession of a weapon and he denied it. With respect to the arrest for criminal possession of a weapon, Tracey stated that he pleaded guilty to attempted assault in the third degree and got a 30 day sentence to which he served ten days for the charge. He explained that he was already doing time so the time he received ran concurrent with his prior conviction. He explained that he had a prior conviction for assault in the third degree, pled guilty and received nine months in that case.

When asked about the facts of the other assault case, Tracey explained that an addict approached him and asked him for drugs, and he slapped the addict. When asked whether the addict approached him because he was a drug dealer, Tracey stated, "He probably came up to me asking me for drugs because he assumed I was a drug dealer. He did not get drugs. He got slapped." Tracey denied when he pleaded guilty to the assault in the third degree charge that he told the judge he intended to injure the person. He stated that he could not recall being asked that question. He acknowledged that he would be willing to tell the judge whatever the judge wanted to hear in order to take a plea.

Tracey explained that he did not lie, that he told the judge the truth about him assaulting the person and that he did his time for the crime that he committed.

Tracey admitted that in 1995 he pleaded guilty to the sale of narcotics, a controlled substance. He said he engaged in that activity for one year from 1995 until he was released in 1996. He admitted that he was a drug dealer during that time and that he was arrested by officers of the Police Department. Tracey stated that he does not spend time paying attention to officers and that on the date of the incident; he was minding his own business in the building that he lives in. He explained that the officer told him to "shut the fuck up and keep it moving" and his response to him was to say, "Smarten up."

Tracey denied making the statement that he "feels like a prisoner in his own community." Tracey was read a portion of his telephone interview with CCRB investigator Cherry:

But simultaneously, I'm walking up the stairs as we're speaking. So now as I'm going up the stairs, the officer that I normally speak to -- an inaudible section -- caused the conversations that we normally have would be like. How come we can't never speak for ourselves. The Jews how, you know, basically, how we're like prisoners in our own community.

Tracey acknowledged making the statement. He explained that it referred to his discussion of the Israelites not being permitted to stand on the sidewalk. Later during cross-examination, Tracey denied making the prisoner statement. As he was continuously probed on the issue, he admitted to making the statement. He denied that he was lying when he said that he did not make the statement. Tracey explained that he was not lying, he said, "It all depends on how you want to interpret it." Tracey further explained that he felt that he was being harassed. The questioning went as follows:

Q: Sounds like you're angry about how the NYPD treats you in your community.

A: When it happens it happens. You understand? I deal with it when it happens. It's nothing to cry about. It happens every day on a regular basis. This is nothing new to me.

Q: So you get harassed on a daily basis?

A: Not a daily basis.

Q: You just said that 30 seconds ago.

A: When it happens, I am adjusted to it. I lived in Brooklyn all my life, my whole entire life. I am adjusted to the harassment...

Tracey acknowledged that he blamed the Respondents for sending him to jail because he had not done anything wrong.

Tracey answered, "No," when asked whether he called Respondent Ortiz a "pussy." Tracey was read a portion of his CCRB interview held on July 27, 2006. Pages 21 to 22 were read, in which he stated, "One was sitting next to me...I was like, you know, excuse my language, but I was like-- I'm sorry, I was like, you know, you is pussy. Why did you do this to me?" When asked whether he made that statement Tracey stated that he could not remember. He explained that he could not recall the specific curse words that he used because he was angry after being assaulted.

Tracey acknowledged that he was carrying on and kicking the cell where he was detained. He denied that he banged his head on the wall in the cell while detained. He admitted that EMS came to his cell and he was checked out, but he was not taken to the hospital because he refused treatment. He stated that his ear was in the same, "busted" condition. He explained that he refused treatment because Respondent Civil told him he

was going home. He acknowledged that he trusted the same officer whom he accused of harassing him.

Tracey was asked why he did not shut his mouth and move on when the officers asked him to leave. He replied, "Yeah, but in America, I can speak. Where are we, Germany?" He stated that he did not get into the police business, he did not curse at that time and he did not assault anyone. Tracey acknowledged that he was in a drug program at the time this incident happened. He explained that he was not a drug addict, but he did use marijuana and he entered into the program based on an agreement between himself, the judge and the District Attorney's Office in an effort to get his case dismissed.

During redirect examination, Tracey stated that his arrest and conviction was 14 years ago and he had not been convicted of a crime since that time. He said that he was in school at the time of the incident, but since the criminal case commenced, he was unable to attend classes and was therefore unable to finish school.

During further cross-examination, Tracey stated that he used to smoke marijuana every other day for seven years but since attending the program; he no longer smokes it to that extent.

Upon questioning by the Court, Tracey described how he was punched. He stated that he was being held against the wall by Respondent Civil who was telling him that he should have shut up and kept it moving. The next thing he knew, Respondent Ortiz came up the stairs on the left-hand side. There were no words exchanged, but he just started punching him on the left side of his head and face. Tracey stated that he tried to put his hands up to block the punches, but Respondent Ortiz instructed him to put his hands down, and when he did so, he was "clocked" one more time. Respondent Civil then

proceeded to spin him around and place him in handcuffs. Tracey said that he was punched four or five times and when he reached the lobby downstairs, the blood began to trickle.

During further cross-examination, Tracy stated that this took place on the second floor landing in a narrow hallway before one reached the third floor.

Meesha DeLeon

DeLeon is a 35-year old postal carrier for the United States Postal Service and has worked there for the past two years. She stated that she is a resident of [REDACTED]

DeLeon said that on July 8, 2006, at approximately 3:40 p.m. she was present inside [REDACTED]

[REDACTED] She stated that she observed some police officers, Tracey, and her godchildren's mother, Aura Triane. She stated that she was at the building because she was going to visit Triane.

DeLeon testified that she saw Tracey inside of the building. She said hello to him and turned to proceed up the stairs but two gentlemen were coming down the stairs so she stepped aside. After they passed her, she turned to see what they were doing and she heard them talking to Tracey. She explained that she did not know who those two men were. They asked him where he was going and he stated that he was going upstairs to his "kid's mother's house." She then observed the two men grab Tracey, bring him into the lobby and push him against a wall. Tracey told them that if they did not believe him, they could check. They informed him that they were not going to check anything.

The men informed Tracey that they had seen him leaving the building earlier in the day. He explained to them that his kid's mother lives on the third floor. They

proceeded to place Tracey in handcuffs. One gentleman had him by the right arm and handcuffed him. Tracey was then thrown to the ground by both of them. The other gentleman tried to get Tracey's left arm out from under him because he fell on top of it. They were moving around, but eventually Tracey's left hand was handcuffed. They picked him up and proceeded out of the building. DeLeon identified Respondent Ortiz and Respondent Civil as the two gentlemen she observed in the lobby on July 8, 2006.

DeLeon testified that both Respondent Ortiz and Respondent Civil were about a foot away from Tracey during the incident. She also testified that she observed blood on Tracey's shirt. She stated that initially she saw one drop, but then more began to appear but she could not describe how much. She said that the blood was on the chest, arm and shoulder areas of his shirt. DeLeon testified that she did not observe Tracey with a weapon or anything else in his hands. She stated that she did not observe anyone else get arrested. DeLeon said she heard Tracey repeatedly ask the officers why they were doing this to him and that he was only going to his girlfriend's apartment. She stated that Tracey could not swing at the officers because they were holding him.

During cross-examination, DeLeon stated that she started to walk up the stairs, but she never quite reached the top of the landing. She stated everything she observed was from the staircase. DeLeon said that when she first observed Tracey, he was not in the lobby, but outside of the doors. When the police first confronted him, they pulled him into the lobby of the building and threw him against the wall in the lobby area. DeLeon stated that Tracey never made it to the second floor.

DeLeon acknowledged that events occurred chronologically as follows: the officers spoke to Tracey. He got handcuffed, then pushed down to the ground. They

lifted him up and then walked him out of the building. She stated that she did not see any officer hit him. She also stated that she never saw one of the officers holding Tracey, while the other officer punched him in the face.

The Respondents' Case

The Respondents testified in their own behalf.

Respondent Mike Civil

Respondent Civil is an almost-five-year member of the Department assigned to the 76 Precinct. He testified that he has made over 200 arrests in his career and assisted in over 1,000. He stated that in July 2006, he was assigned to the 70 Precinct. On July 8, 2006 he was assigned to the Street Narcotics Enforcement Unit (SNEU). He could not recall what tour he was working, but he believed he was assigned to the apprehension team that day.

Respondent Civil testified that at some point during that tour, someone was arrested at [REDACTED] charged with possession of a controlled substance. He believed the arrest was in the lobby or vestibule of the building. He noted that the person apprehended at that time was not Tracey. He also noted that he did not make the arrest. Respondent Civil said that there was a concern that more of the drugs remained inside of the building, so three or four officers from the unit began looking for drugs in the immediate area. He stated that they found Ziploc bags in the front entrance area of the building. He said that he, Respondent Ortiz, Officer Kaloff and Officer Clark searched

the area. He also testified that he conducted a “vertical”² of the building by going to the top of the building and working his way down by way of the staircase. He said that he looked around and spoke to people inquiring whether they knew of any illegal activity in the building.

Respondent Civil said he heard some commotion. He observed officers telling a person, later identified as Tracey, that he could go upstairs, but that he had to give them a second because they were looking for something. He then heard Tracey make remarks such as, “Why the fuck are you stopping me?” and “I am tired of you guys fucking stopping me.”

Respondent Civil testified that when he first observed Tracey, he was on the second floor and Tracey was coming up the stairs near the landing. Respondent Civil said he was in plainclothes and he did not believe Tracey knew he was a police officer until he got close enough to observe the shield around his neck. He stated that Tracey then turned his anger toward him. Tracey questioned why he was in the building and made remarks such as “Why the fuck are you in my building?” Respondent Civil told Tracey he did not know what occurred with him and the other officers, and told Tracey not to take his frustrations out on him. Tracey continued to argue with him. Respondent Civil stated that he then told Tracey, “Nobody is stopping you. Go where you’re going. I am giving you a lawful order to go where you’re going.” Respondent Civil said Tracey continued to be animated as he proceeded to flail his hands by raising his clenched fists and pointing them toward him as he moved in his direction approximately an arms length away.

² vertical patrol

Tracey turned quickly in a threatening manner and Respondent Civil pushed him away. He said that when he pushed him, Tracey came in contact with the wall. He then spun Tracey around and handcuffed him. He explained that they were standing in a narrow hallway and he thought Tracey was going to hit him. After handcuffing Tracey, he noticed that Tracey had a cut on the back of his ear. Respondent Civil did not believe that any other officer assisted him in handcuffing Tracey. He denied striking Tracey and denied observing any other officer strike Tracey. He also denied holding Tracey before he handcuffed him so that Respondent Ortiz could strike him.

After transporting Tracey to the police van, Respondent Civil said that Tracey was taken to the station house. He also notified EMS to meet them at the station house. He stated that Tracey did not leave with EMS. Respondent Civil also denied making any deal with Tracey that if Tracey did not go to the hospital he would be released from custody.

During cross-examination, Respondent Civil stated that at the time of this incident, he had been on the police force for two years. He explained that in two years, he went from the Field Training Unit after nine months, to eight months on patrol and then to the SNEU team. He acknowledged that he enjoyed his assignment at SNEU and that it was more exciting than working patrol. He admitted that he did not want to be put back to patrol after only two months in SNEU. He also admitted that to stay in SNEU he would have had to do his job correctly.

Respondent Civil stated that he was familiar with the scale of escalating force. He acknowledged that if a person was providing minor resistance, he could use grips to overpower him and arrest him. He said that he would use the minimum amount of force

necessary to effectuate the arrest. Respondent Civil acknowledged that at the time of Tracey's arrest, he and the other officers were engaged in an investigation. He explained that a defendant, not Tracey, had been arrested and some drugs were recovered. They were concerned that the defendant may have left more drugs behind so they continued the search in the lobby area of the building. While conducting the search, Respondent Civil admitted that Tracey was not getting involved in the arrest of the defendant because it had already transpired. He explained, however, that he was unable to do his job because Tracey was yelling, cursing and causing a scene and public alarm. He said that apartment dwellers were opening their doors to see what was going on. Respondent Civil acknowledged that Tracey did not pick up or tamper with evidence. He also said that he arrested Tracey because he refused a lawful order to disperse.

Respondent Civil was questioned as to why he did not charge Tracey with trespassing. Respondent Civil stated that Tracey informed him that he was going to pick up his son. Therefore he had a lawful purpose to be in the building. He was also questioned about why he did not charge him with disorderly conduct. Respondent Civil stated that he did. Respondent Civil was shown a copy of the complaint and arrest report. He acknowledged that it stated obstructing governmental administration and menacing, but not disorderly conduct. He explained that he had disorderly conduct in his paperwork, but someone else typed up the paperwork. He further explained that disorderly conduct was mentioned in the words he typed up which stated that the defendant did impede and refused several orders to leave.

Respondent Civil acknowledged that Tracey did not threaten to shoot or stab him or any other officers and he did not verbally threaten him or any other officers either, yet

Tracey was charged with menacing. Respondent Civil stated that he charged him with menacing based on the way he clenched his fists and turned toward him in a threatening manner. Respondent Civil denied ever telling Tracey to "shut the fuck up and move on." He said that he was on the second floor when officers on the first floor were speaking to Tracey. Tracey then approached the second floor and brought the argument to him.

After placing Tracey in handcuffs, Respondent Civil said he noticed a trickle of blood. He testified that he did not observe blood on him prior to placing him in handcuffs. He acknowledged that he told CCRB that Tracey was either injured by a nail or him pushing him against the wall. Respondent Civil said that he noticed Tracey bleeding while he was being transported to the station house, so he called for EMS to meet them at the station house. When Respondent Civil was asked, "Did you ask Mr. Tracey to sign a paper so that it wouldn't appear that he was injured while in your custody?" He replied, "I don't have any say so in that. EMT or EMS handles all of that. Okay. They are professionals. Your accusations here, you know, are a bit, you know, demeaning." Respondent Civil acknowledged taking Tracey to the bathroom after he asked to go there. He denied telling him in there that Respondent Ortiz broke someone's nose.

During redirect examination, Respondent Civil stated that arresting the drug dealer on the incident date was not the end of his police duties. He explained that he had a responsibility to locate the drug "stash." This included searching the lobby where the drug dealer was arrested. Respondent Civil stated that although civilians are allowed to watch as he takes police action, they are not allowed to contaminate a crime scene so he may ask civilians to step back. He stated that he did take such action in this instance.

Respondent Civil stated that he had been struck in the past by someone he was attempting to place under arrest. He explained that the person does not give notice before he strikes someone. He stated that he thought Tracey was going to punch him.

Upon questioning by the Court, Respondent Civil testified that he had completed his vertical patrol of the building. He had gone to the top floor and was on his way down to the second floor when he heard the commotion. He stated that when he observed Tracey injured, he had blood trickling from behind his ear onto his shirt. He denied using any profanity in his exchange with Tracey. He stated that he simply told him to go where he was going. Respondent Civil stated that his responsibility on the SNEU team that date was apprehension. When his observation team observed a positive buy for drugs, he would go in and apprehend the individual or individuals involved. He stated that at no point did Tracey end up on the floor when he was arresting him.

During further cross-examination Respondent Civil stated that he worked with Respondent Ortiz for approximately three months at the time of the incident. He explained that they worked on the same field team, but he was not his partner.

Respondent Jerry Ortiz

Respondent Ortiz is an almost-four-year member of the Department currently assigned to the 70 Precinct working in the schools. He testified that prior to joining the Department, he spent four years in the United States Army. He is currently in reserve status with the Calvary Army National Guard. Once completing his training in the Police Academy, Respondent Ortiz stated that he went to the 70 Precinct, where he was assigned

to Impact, patrol and then the SNEU team. To date Respondent Ortiz said that he made 150 arrests and assisted in over 1,000 arrests.

On July 8, 2006 Respondent Ortiz testified that he was assigned to the 70 Precinct working with the SNEU team and assigned to the prisoner van. He stated that when he arrived, the defendant was already under arrest, and he was instructed to place him in the prisoner van and then assist the apprehension team in the search for evidence inside of the building. Respondent Ortiz stated that while he was in the lobby of the building, Tracey entered the lobby. Police Officer Clark spoke with Tracey and told him to hold on one second. Respondent Ortiz stated that it appeared that Tracey knew Clark from previous experiences, and that Tracey began to argue with Clark at that time. Respondent Ortiz stated that he heard Tracey question why the police have to come to his "fucking building." He also heard that Tracey was instructed to go upstairs but Tracey continued to argue.

Respondent Ortiz said he continued to search with Officer Kaloff when they heard a commotion upstairs. They then proceeded to go upstairs and found Tracey in handcuffs with Respondent Civil. Respondent said he did not observe any injury on Tracey. He explained that he learned later on that Tracey had an injury but he did not observe it for himself. He denied having any physical contact with Tracey. He stated that he did not transport Tracey to the prisoner van and he believed Respondent Civil transported him to the van because he arrested him. He said that Respondent Civil did not need any help transporting Tracey to the prisoner van.

During cross-examination, Respondent Ortiz acknowledged that he had been with the Police Department for almost four years and was also in the military. He stated that

he was a crew member on the M1 tank while in active duty. He admitted that at the time of the incident, he had only been with the Department for two years. He acknowledged that much like Respondent Civil, he moved up quickly in the Police Department. He stated that on the incident date, he had been working with SNEU for two to three months. He explained that he was recommended for SNEU by his commanding officer and other bosses at his station house based on his excellent police work. He stated that he enjoyed working in SNEU. He further explained that approximately a year ago, he was asked and volunteered to work in the precinct's school unit. He stated that his duties included handling truancy, setting up activities for children in the schools and protecting the general public from other school children who come to rob the children in his area.

On the date of the incident, Respondent Ortiz testified that when he arrived at the scene, the drug dealer was already under arrest but not in the prisoner van yet because he was driving it. He stated that he did not place the prisoner in the van but he could not recall who did. He acknowledged that the drug dealer was already observed by the observation team and the apprehension team already arrested him. Respondent Ortiz acknowledged that he was not part of either team that day. Respondent Ortiz was asked if he recalled the following question and answer from his CCRB interview:

- Q: Okay. So directing your attention to—you have it in your memo book at 3:30 p.m. on the 8th of July 2006. Can you just tell me what happened?
- A: I was conducting an operation. I observed two males engage in a hand-to-hand transaction. We went to recover...

Respondent Ortiz was asked whether he informed CCRB of the hand-to hand transaction. He stated that he used his memo book to refresh his memory overall as to what the team had done that day. He denied placing anyone under arrest. He stated that on the incident date, he did not hear Tracey threaten anyone with force or a weapon. He did not hear

Tracey tell the officers how to do their job and Tracey was not seen trying to recover any items. He explained that Tracey could stand and observe the police activity, but when he was told to leave and he refused, he was impeding the investigation. He acknowledged that Tracey was not impeding on an arrest because the arrest of the drug dealer had already been made.

Upon questioning by the Court, Respondent Ortiz testified that when he spoke to CCRB, they asked him to read verbatim from his memo book and that is what he did. He acknowledged that he did not see the hand-to hand transaction but merely read his log entry about the incident date to the CCRB investigator. He had no recollection of seeing DeLeon at the scene.

FINDINGS AND ANALYSIS

Respondent Civil stands charged with using excessive force against Habakkuk Tracey by throwing him against a wall and holding him there by his shirt. The Respondent is found Not Guilty. Evidence adduced at trial established that on July 8, 2006, Respondent Civil and his field team were working for the Street Narcotics Enforcement Unit (SNEU). The team had just made an arrest of a drug dealer and was looking for his stash of drugs in the lobby area of the building when Tracey entered the lobby of the building. Tracey said he was there to pick up his son. He acknowledged that when he entered the building, officers on the scene asked if that was him, referring to whether he was the defendant apprehended for selling drugs. Tracey exchanged words with officers as he entered the building. While the police were conducting their investigation, Tracey stated that he was having conversation with one of the officers he

knew. He then said that both Respondent Ortiz and Respondent Civil said to him, "Shut the fuck up. Keep it moving." After telling them not to speak to him in that way, Tracey said to them, "Smarten up."

Tracey said that Respondent Civil then ran up the stairs to where he was, grabbed him, threw him against the wall and told him he should have kept his mouth closed. Just then, Respondent Ortiz came up to him and punched him four or five times on the left side of his head. Respondent Civil told him that he was going to jail and Tracey said his left ear was "busted open." Tracey was questioned as to why he was angry on the night of the incident with the police. The colloquy went as follows:

Q: And Mr. Tracey why were you angry on the day of the incident with the police?

A: I was assaulted for no reason...I can see the grabbing and the throwing me against the wall and the searching me, but the assault part was like, it was real dim to me. I couldn't understand that.

Based on the circumstances that Tracey found himself in, he understood why he was stopped by the police and pushed against the wall. Respondent Civil testified that he gave Tracey a direct order to go where he was going and Tracey failed to comply. As he observed Tracey clench his fists and move toward him, Respondent Civil testified that he thought Tracey was going to punch him so he pushed him away, swung him around and attempted to place him in handcuffs. Both Tracey and Respondent Civil testified that the hallway where this took place was very small and narrow. Respondent Civil explained that he was going to arrest Tracey for disorderly conduct and obstructing governmental administration for not complying with his order to leave the area where the police investigation was taking place.

Respondent Civil explained why he spoke to Tracey and ended up pushing him. It is the belief of this Court that Respondent Civil used the amount of force that he thought was necessary to contain Tracey who was not following his directives. During the course of him pushing Tracey, Tracey may have sustained a superficial laceration behind his ear which is supported by the medical records in evidence.

Accordingly, I find Respondent Civil Not Guilty.

Respondent Ortiz stands charged with using excessive force against Tracey Habakkuk by repeatedly striking him in the face with a closed fist. I find Respondent Ortiz Not Guilty of this Specification. I found the testimony of Tracey in many respects to be less than candid with this Court. Tracey began his testimony by stating that he lived at the Bedford Avenue incident location. Later in his testimony he said it was the home of his son's mother. A review of the medical records listed his address as East 21st Street in Brooklyn. Tracey stated during cross-examination that he was never arrested for criminal possession of a weapon. He was shown a document to refresh his recollection which contained his name and the Penal Law section 265.01 [criminal possession of a weapon] and he still denied being charged with that crime. He would only admit to pleading Guilty to another offense. Tracey denied ever calling Respondent Ortiz a "pussy." He was read a portion of his CCRB interview held on July 27, 2006 in which he made the statement. Tracey said he could not recall the specific curse words he used because he was angry about being assaulted.

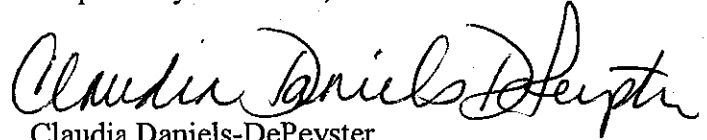
Tracey stated that after he was stopped by Respondent Civil, Respondent Ortiz walked up to him and without saying a word, began to punch him in the left side of the head four or five times. Tracey said that eventually he was treated at the hospital and received five stitches to close his wounds.

A review of the medical records for Tracey (DX 1) reveals that he was treated at the Kings County Hospital Center Emergency Room on July 8, 2006. He received one suture to the laceration behind his left ear. The records make no mention of how he sustained the injury. It notes that he had a superficial laceration behind the ear. The health form from the Prearrestment Screening Unit noted in question 46 that there was no evidence that Tracey suffered any acute, medical or mental problems. There was no treatment for any swelling or bruising to the left side of the face. The treatment Tracey received was not consistent with what one would expect following several punches to the left side of his face. Rather it was consistent that Tracey sustained the laceration to the area behind his ear when he was pushed to the wall in the narrow hallway and later handcuffed by Respondent Civil. As was stated earlier, this Court did not find that the force used by Respondent Civil was excessive.

Furthermore, this Court heard the testimony of DeLeon, an independent eyewitness to the incident. She stated that Tracey said he was on his way to get his son at the son's mother's apartment. Words were exchanged between Tracey and the officers and he was pushed to a wall, then to the ground and placed in handcuffs and then escorted out of the building. She testified that she did not see any officer strike Tracey or hold Tracey while another officer punched him in the face.


Based on the record as stated above, I find that the Department failed to meet its burden by a preponderance of the credible evidence and as such, I find Respondent Ortiz Not Guilty as charged.

Respectfully submitted,



Claudia Daniels-DePeyster
Assistant Deputy Commissioner-Trials

APPROVED



JUL 22 2009
RAYMOND W. KELLY
POLICE COMMISSIONER